FERDINAND IP
INTELLECTUAL PROPERTY
LICENSING
ENTERTAINMENT
CORPORATE

FRANCE
GERMANY
UNITED KINGDOM
UNITED STATES OF AMERICA

24IP LAW GROUP

ALEXANDER R. MALBIN, ESQ.
Email: amalbin@24iplg.com
Admitted in NY

December 21, 2015
LETTER-MOTION – FILED VIA ECF

The Honorable Ronnie Abrams
United States District Judge
Southern District of New York
40 Foley Square, Room 2203
New York, NY 10007

Re: ***Johnson v. FlexCo, LLC***
Civil Action No. 15-cv-7530 (RA)
Letter-Motion For Leave to File Amended Complaint & For Rescheduling of Adjourned Initial Pretrial Conference

Dear Judge Abrams,

We represent the Plaintiff, Eric Johnson ("Plaintiff"), in the above-captioned action. Pursuant to Rules 5.2 and 7.1 of the Local Rules of the U.S. District Court for the Southern District of New York, Rule 13.1 of the Electronic Case Filing Rules & Instructions of the U.S. District Court for the Southern District of New York, and the Individual Rules & Practices in Civil Cases of Your Honor, Plaintiff, by and through his undersigned attorney, hereby respectfully moves the Court for leave to file an amended complaint, as well as to reschedule the Initial Pretrial Conference initially scheduled for December 4, 2015 at 11:30 a.m. (*see* Docket No. 8) and adjourned by Order of the Court on November 30, 2015 (*see* Docket No. 13).

As explained in further detail herein, Plaintiff seeks leave of the Court to file an amended complaint due to the apparent "alter ego" status of the only defendant currently named in this action, FlexCo LLC ("FlexCo"), to add as a co-defendant and assert claims against the individual believed to be operating FlexCo as his "alter ego".

This action is premised upon the unauthorized use of certain copyrighted photographs created and owned by Plaintiff on the website located at the domain name www.inflexwetrust.com (the "Website"). The Website is registered by a "proxy registrant," which is a business who registers web site domain names on behalf of other persons or entities, and keeps confidential the identity of the person or entity on whose behalf it registers a domain name. For this reason, publicly-available domain registration records do not identify the true owner of the Website, instead only identifying the proxy registrant who registered the Website on behalf of the unidentified owner.

As set forth in the Complaint, our investigation revealed that FlexCo was the owner of the Website as of February 6, 2014, having been transferred ownership of, *inter alia*, the Website, from its prior owner, IFWT, Inc. ("IFWT"), by written agreement executed on that date (the "IFWT-FlexCo Agreement"). Accordingly, this action was initially brought against FlexCo as the only named defendant.

NEW YORK OFFICE
125 PARK AVENUE, 25TH FL
NEW YORK, NY 10017
P +1 (212) 520 4296
F +1 (203) 905 6747

WESTPORT OFFICE
129 POST ROAD EAST
WESTPORT, CT 06880
P +1 (203) 557 4224
F +1 (203) 905 6747

LOS ANGELES OFFICE
604 ARIZONA AVENUE
SANTA MONICA, CA 90401
P +1 (323) 872 0660
F +1 (203) 905 6747

SILICON VALLEY OFFICE
800 W EL CAMINO REAL, STE 180
MOUNTIAN VIEW, CA 94040
P +1 (650) 903 2201
F +1 (203) 905 6747

LA JOLLA OFFICE
2255 AVENIDA DE LA PLAYA, STE 3
LA JOLLA, CA 92037
P +1 (858) 412 4515
F +1 (203) 905 6747

www.24ip.com
www.ferdinandip.com

Plaintiff commenced this action by filing his Complaint on September 23, 2015 (*see* Docket No. 1). Our process server served the case-initiating papers upon FlexCo on November 3, 2015 by way of personal service upon the New York Secretary of State (*see* Docket No. 10). Thereafter, FlexCo failed to respond to the Complaint or appear in this action within the 21-day time period following service to serve a responsive pleading or otherwise appear set forth by Fed. R. Civ. Proc. 12. We therefore filed a Request to Enter Default against FlexCo with the Court on November 25, 2015 (*see* Docket No. 11).

Our efforts to serve the default papers upon FlexCo proved unsuccessful, as our delivery of the default papers was "returned to sender" with an indication that no such entity exists at the address to which the shipment was sent.[1] Furthermore, the case-initiating papers which our process server served upon the New York Secretary of State (*see* Docket No. 10) were subsequently returned to us along with a letter from CT Corporation System of Indianapolis, Indiana, the agent for service of process identified in FlexCo's records with the New York Secretary of State (and to which the New York Secretary of State delivered the case-initiating papers served upon it by our process server), informing us that CT Corporation System had resigned as FlexCo's agent for service of process.

All in all, the foregoing indicates to us that FlexCo may be a "shell" company, and may not be the true owner of the Website (or perhaps not even an operating business entity).

As explained above, the Website's proxy registration does not identify the actual registrant, instead only identifying the proxy registrant. The Website itself does not provide any clear indication of its owner and operator; the entity identified as copyright-owner in the footnote of every page of the Website, Funkmaster Flex, Ltd., is not an existing entity in the records of any state's Secretary of State business records. FlexCo is not identified anywhere on the Website whatsoever. However, the Website's "contact" page identifies "@FunkmasterFlex" as its General Management and CEO.

Funkmaster Flex is the performing moniker of Aston Taylor Jr., a well-known radio deejay and music producer within the music industry and among the public (hereinafter "Taylor"). Indications on the Website and elsewhere suggest that Taylor personally operates the Website, as a promotional vehicle for himself, his Funkmaster Flex brand, and his radio deejay and music production services.

In the IFWT-FlexCo Agreement, along with the Website, IFWT also assigned to FlexCo ownership of a number of U.S. trademark registrations and pending applications for the marks IN FLEX WE TRUST (which is identical to the name of the Website), FUNKMASTER FLEX, DJ FUNKMASTER FLEX, DJ FUNK FLEX, FUNK FLEX, and FMF, all for use in connection with, *inter alia*, web sites (the "Funkmaster Flex Trademarks"), as well as ownership of the rights of publicity in and to Taylor's name, voice, likeness, and biographical materials (the "Funkmaster Flex Publicity Rights"). Additionally, Taylor personally executed the IFWT-FlexCo Agreement with an acknowledgement that he was 100% owner of IFWT, and with an supplemental assignment to FlexCo, in his personal capacity, of ownership of all remaining right, title, or interest he retained at that time in the Website, the Funkmaster Flex Trademarks, and the Funkmaster Flex Publicity Rights.

---

[1] The address to which we attempted to make such delivery to FlexCo was obtained from the IFWT-FlexCo Agreement, as well as from U.S. trademark registrations for which FlexCo is identified as the record owner on the USPTO's trademark registration records database – all of which identify the same street address in Ardsley, New York as FlexCo's address.

Despite such assignment by IFWT and Taylor to FlexCo, our investigation has revealed that Taylor continues to make substantial personal use of the Website, the Funkmaster Flex Trademarks, and the Funkmaster Flex Publicity Rights. A number of social media pages actively operated under the name Funkmaster Flex provide hyperlinks referring visitors to the Website. These pages, while making considerable use of the Funkmaster Flex Trademarks and Funkmaster Flex Publicity Rights, nowhere identify FlexCo as the operator such pages, instead only identifying Taylor (and his moniker Funkmaster Flex). Likewise, the Website itself heavily promotes Taylor and his Funkmaster Flex brand; while it identifies Taylor (and his moniker Funkmaster Flex) as its CEO and general management, nowhere does the Website identify or indicate any connection whatsoever to FlexCo.

The foregoing indicates that Taylor is still responsible for operation of the Website and still engages in substantial personal use (for his own personal benefit) of the Website, the Funkmaster Flex Trademarks, and the Funkmaster Flex Publicity Rights, despite his and IFWT's purported assignments of ownership thereof to FlexCo in February 2014. FlexCo's lack of engagement of an agent or service process, and failure to engage another agent for service of process or to identify an alternate registered agent in its records with the New York Secretary of State, further indicates that FlexCo has failed to comply with corporate formalities, and is rather operated as an "alter ego" of Taylor.

Given all the foregoing, we now believe that the Website is operated by Taylor, and that Taylor maintains the FlexCo entity as his "alter ego," as an illicit means of avoiding legal liability for activities performed by Taylor and for Taylor's benefit, but purportedly in the name of FlexCo – including the ownership and operation of the Website, and the infringing use of Plaintiff's copyrighted photographs thereon. Accordingly, on behalf of Plaintiff, we seek leave to file an Amended Complaint, adding Taylor as a co-defendant and asserting causes of action against Taylor for direct copyright infringement, vicarious copyright infringement, and alter ego liability for copyright infringements purportedly engaged in by FlexCo.

Fed. R. Civ. P. 15(a)(2) permits a party to amend its pleading with leave of court, and provides that "[t]he court should freely give leave when justice so requires." *See also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). Moreover, there is a clear policy in the Second Circuit of permitting litigants freedom to amend pleadings so that causes of action will be tried on the merits. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000) ("'mere technicalities' should not prevent cases from being decided on the merits"), *citing Foman*.

Accordingly, Plaintiff respectfully requests that the Court grant leave to file an Amended Complaint, adding Taylor as a co-defendant and asserting causes of action against Taylor holding him liable for the infringing uses of Plaintiff's copyrighted photographs on the Website, so that liability for the infringements of Plaintiff's photographs cannot be escaped by the use of a "shell" company as an "alter ego" formed for the purpose of avoiding such liability.

Plaintiff has not previously amended or sought to amend his Complaint. He has diligently investigated this matter to the best of his ability (given, *inter alia*, the efforts described above to obscure the Website's true owner and operator), and promptly seeks leave of Court to amend his Complaint in light of his recent discovery of FlexCo's failure to maintain a registered agent for service of process with the New York Secretary of State, failure to respond to the Complaint or appear in this action, and failure to accept service by mail of Plaintiff's request to enter default.

Upon filing and subsequent service upon the prospective co-defendants of an amended complaint, this case will be effectively re-commenced. Accordingly, should the Court grant Plaintiff leave to file an amended complaint, Plaintiff respectfully requests that the Court reschedule the Initial Pretrial Conference, initially scheduled for December 4, 2015 at 11:30 a.m. and adjourned by Order of the Court on November 30, 2015 (*see* Docket Nos. 8 & 13), to a date and time convenient for the Court. (Because FlexCo has not appeared in this action, FlexCo has not consented to the requested rescheduling of the Initial Pretrial Conference.) This is Plaintiff's first request for rescheduling of the Initial Pretrial Conference since its adjournment on November 30, 2015.

Very truly yours,

Alexander Malbin, Esq.
Ferdinand IP, LLC
125 Park Avenue
25th Floor, Suite 2508
New York, NY 10017
(p) (212) 220-0523
(f) (203) 905-6747
amalbin@24iplg.com
Counsel for Plaintiff, Eric Johnson